[redacted]

In the

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted]

NICHOLAS J. O'CONNELL, JR., *etc. et al.*,

Petitioners,

v.

JOSEPH V. MANNING, *etc. et al.*,

Respondents.

No. [redacted]

AMERICAN AIRLINES, INC.,

Petitioner,

v.

JOSEPH V. MANNING, *etc. et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 454

NICHOLAS J. O'CONNELL, JR., *etc., et al.*,

Petitioners,

v.

JOSEPH V. MANNING, *etc., et al.*,

Respondents.

No. 455

AMERICAN AIRLINES, INC.,

Petitioner,

v.

JOSEPH V. MANNING, *etc., et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents ("Engineers" or the "Chapter") hereby oppose the petitions of Nicholas J. O'Connell, Jr., *et al.*

("Pilots") in No. 454 and American Airlines, Inc. ("Company") in No. 455.*

Statement of the Case

A statement of the case sufficient for consideration of these petitions is incorporated in the points of the argument. For a comprehensive statement of this case and the ALPA case, which were tried together, the Court is respectfully referred to the opinion of the District Court (R. Vol. III, 1b, *ff.*).

Argument

1. This Court Denied Certiorari to Review the Affirmance in a Case Tried Together with This Case and Involving a Like Determination by the District Court.

In the District Court the Engineers were the intervenors in an action which plaintiff Air Line Pilots Association ("ALPA") brought to compel the Company to recognize it as the bargaining representative of the pilots in its employ. What precipitated the litigation was the refusal of the Pilots, then constituting the ALPA negotiating committee, to comply with the "crew complement" policy of the International in the negotiations under way with the Company. Over ALPA's objections, the Company continued to bargain with the Pilots; as would appear only later, the Pilots were well on the way to establishing an independent union.

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* The Engineers, referred to in the Pilots' petition as the "FEIA," are the president of the American Airlines Chapter of the Flight Engineers' International Association and the Chapter itself; however, the International was party neither to the Chapter's agreement with the Company nor to any of the events underlying this dispute.

Since the "crew complement" negotiations had been tripartite and merger of the Chapter with ALPA had been contemplated, the Chapter intervened, seeking only a declaration of the rights of the parties. Thereafter, the Chapter was constrained to seek an injunction to compel the Company to recognize it as the bargaining representative of the flight engineers. For though no other organization represented or claimed to represent the flight engineers, the Company had become adamant in its position that the Chapter, having participated in tripartite "crew complement" negotiations, had thereby surrendered its representation rights with respect to wages and other working conditions of the flight engineers to a "joint committee" controlled by the Pilots. The Company resorted to this tactic because the Chapter, after the rift within ALPA, had resisted committing itself to merger with a pilot labor organization then unknown and unknowable, the legal propriety of which was the core of the ALPA complaint.

In the District Court, where ALPA's and the Chapter's refusal-to-bargain complaints were tried together, the Company's principal defense was that both cases involved a representation question within the exclusive jurisdiction of the National Mediation Board. In the Court of Appeals as well, that was the Company's principal contention in both cases.

The District Court found there was a substantial question as to the identity of the pilots' bargaining representative and denied ALPA's motion for a preliminary injunction; it dismissed ALPA's complaint for lack of jurisdiction and severed that case from the Chapter's (R. Vol. III, 52b;

57b). The Second Circuit affirmed, and this Court denied certiorari. *Ruby* v. *American Airlines, Inc.*, 227 F. Supp. 674 (S. D. N. Y.), *aff'd*, 323 F. 2d 248 (2d Cir. 1963), *cert. denied*, 376 U. S. 913 (1964).

At the same time the District Court found there was *no* representation question concerning the flight engineers and granted the Chapter's motion for a preliminary injunction (R. Vol. III, 55b). The Second Circuit has affirmed and denied the petitions for a rehearing, one judge dissenting; the petitions for rehearing *en banc* were also denied, without dissent (Jt. App. 44-47).

If there was no compelling reason to review the affirmance of the District Court's determination in the ALPA case, there would appear to be no compelling reason to review the affirmance in this case of a like determination by the same District Court rendered in the same opinion after the same trial.

2. The Company's Lofty Protestations Notwithstanding, This Case Turns Entirely on Its Own Facts and Should Not Be Reviewed by This Court.

The first reason the Company advances for granting certiorari is more formal than substantial. The Company asserts that "the proper functioning of appellate review in the federal courts" is at issue (Pet. 12), but what the reason comes to is that the majority in the Court of Appeals improperly characterized the following statement from the 55-page opinion of the District Court as a finding of fact rather than a conclusion of law:

> From at least as early as January 31, 1963 to July 11, 1963, the Company refused to bargain collectively with the Chapter, and until at least as late

> as March 15, 1963 the Company instead bargained collectively in respect of flight engineers only with a committee, of which O'Connell was Chairman, and which the Company claimed represented the flight engineers. (Jt. App. 3)

The statement quoted cannot be a finding of fact, the Company contends, because (a) it was not "separately stated" to be such, in violation of Fed. R. Civ. P. 52(a), thereby throwing the Court of Appeals into confusion, and because (b) the Company's refusal to bargain took some form other than a refusal to meet, thereby precluding any other such fact-finding!

However, Fed. R. Civ. P. 52(a) expressly permits, "if an opinion or memorandum of decision is filed," that findings and conclusions "appear therein"; and it is well-settled that wherever in the opinion a finding (or conclusion) appears or however it is labeled, the Rule is reasonably complied with if the opinion affords an adequate understanding of the basis of decision.*

Furthermore, it is quite clear that the majority viewed the quoted statement as they would any "traditional conclusory statements of fact based upon a distillation of the proofs and the making of essential inferences of fact" (Jt. App. 5). To the majority it was clearly the "critical find-

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* *Elam* v. *United States*, 250 F. 2d 582, 583 (6th Cir.), *cert. denied*, 358 U. S. 848 (1958); *Stone* v. *Farnell*, 239 F. 2d 750, 755 (9th Cir. 1957); *Food Fair Stores, Inc.* v. *Square Deal Mkt. Co.*, 206 F. 2d 482, 484 (D. C. Cir. 1953), *cert. denied*, 346 U. S. 937 (1954); *Central Ry. Signal Co.* v. *Longden*, 194 F. 2d 310, 320 (7th Cir. 1952); *Benrose Fabrics Corp.* v. *Rosenstein*, 183 F. 2d 355, 357 (7th Cir. 1950); *Burnham Chemical Co.* v. *Borax Consolidated, Ltd.*, 170 F. 2d 569, 574 (9th Cir. 1948), *cert. denied*, 336 U. S. 924 (1949).

ing," but hardly the only finding (Jt. App. 3). The majority next proceeded

> . . . . to a chronological statement of the course of events supplemented by comments and discussion, all for the purpose of demonstrating that the finding quoted above is supported by substantial evidence. In the process we think it will clearly appear that the proofs overwhelmingly support the finding . . . (Jt. App. 5)

It was immaterial to the majority, as it was to the District Court, *and* as it was to the Engineers, whether the Company bargained with the Engineers "across one table" jointly with the Pilots or "across two tables" (Pet. 2-3). The crucial question, rather, was whether the Company discharged its duty effectively to recognize the Chapter as the bargaining representative of the flight engineers with respect to flight engineer wages and working conditions, whatever form the bargaining took. The inescapable answer was that the Company had not. The Company refused even to talk to the Engineers directly at the "joint" meetings (Jt. App. 13) and refused even to meet with them separately other than in "bull sessions" at which it would not "talk wages" (Jt. App. 14). Such conduct frustrated, rather than facilitated, the recommendations of the Feinsinger Commission that there be a "voluntary merger on fair and honorable terms," affording the flight engineers "a full measure of legally enforceable security" (R. Vol. IV, 2d, 3d). That was and remains the Engineers' position.

As for the Company's principal defense—that the Chapter had definitively relinquished its representation rights to the Pilot-controlled "joint committee"—the District Court

stated, "The difficulty is that the facts do not support such contention" (R. Vol. III, 53b). In the Court of Appeals, both the majority and the dissenting judge agreed that the position was "insupportable" (Jt. App. 16). The dissenting judge stated even that "this claim was specious and its making ill-advised"; yet he treated it as no more than an annoying argument of counsel (Jt. App. 26 n. 2)! However, as detailed in the majority opinion (Jt. App. 12-14), the Company took that position not only in this litigation, but in the negotiations, in which Company counsel, an employee of the Company, participated actively (Jt. App. 14).

Moreover, as the District Court further found, the Company not only refused to bargain with the Engineers, but, even after proceedings had commenced in court, "instead bargained" with the Pilots "in respect of flight engineers," concluding "an overall agreement" which covered "both pilots and engineers" (R. Vol. III, 40b-41b, 53b).

It is also quite clear that the majority gave "due regard . . . to the opportunity of the trial court to judge of the credibility of the witneses," within the letter, and spirit, of Fed. R. Civ. P. 52(a)—a prescription especially compelling in this case, which took weeks to try and produced over 3,000 pages of transcript and approximately 250 exhibits (Jt. App. 3, 5, 11, 15, 16).

In view of the majority's discussion of the facts and of the law, can it be reasonably supposed that the disagreement within the Court of Appeals was attributable, as the Company contends, to the District Court's failure to label the statement in issue? Can it be reasonably supposed that,

whatever the label, the majority would have held otherwise on this record?

Far from raising an important question of federal law which this Court should settle, the Company's petition seeks review of a decision which turns entirely on its own facts.

3. In Enforcing the Company's Duty to Bargain under the Railway Labor Act, the Courts Below Applied Well-Settled Law.

The next reason the Company advances for granting the writ is that the National Mediation Board, not the District Court, has "exclusive or primary" jurisdiction to determine whether or not the Company bargained properly, since it was bargaining "under the Board's auspices" (Pet. 3). The Company adds that but for the Chapter's resort to litigation, bargaining would have flourished, whereas "in the heat of litigation, bargaining soon withered" (Pet. 14).

The argument is utterly spurious. It flies in the face of the facts. The Company had taken its "joint committee" stand at least as early as January 31, 1963; persisted in that position throughout February 1963, declining to deal directly with the Engineers at the "joint meetings"; and refused to meet with the Engineers separately in March 1963 except in "bull sessions" where it would not "talk wages" even after the exchange of Section 6 notices (Jt. App. 11-14).

Even assuming, as the dissenting judge did (Jt. App. 33), that the Chapter had misconceived the Company's conduct and had been rash in running to court, its rashness was hardly irreversible. The Company could have commenced bargaining with the Engineers, or the Company

could have ceased bargaining with the Pilots. Instead, on March 15, 1963, *before* the Engineers petitioned for an injunction, the Company confirmed the Engineers' fears and compounded its refusal to bargain by concluding with the *Pilots* a collective bargaining agreement covering the *flight engineers* "as to compensation and everything else" (R. Vol. III, 41b). "The heat of litigation" only kindled *that* bargaining. "The cry 'they sued us' has a hollow ring" (Jt. App. 19). Rather, this was "a power play from first to last" (Jt. App. 20).

Moreover, the Company and the Engineers were *not* in mediation. It was the Pilots, not the Engineers, who had reached an impasse in negotiating the terms of their basic agreement and had been in mediation (R. Vol. III, 10b, 14b). It was not until February 28, 1963, that the Engineers and the Company exchanged Section 6 notices affecting their basic agreement (R. Vol. III, 39b). So far as concerned the Engineers, the NMB's function had been confined to resolving the "crew complement" issue (R. Vol. III, 19b). The District Court was not dazzled by this NMB backdrop.

It is a fundamental feature of the Railway Labor Act that invocation of the NMB is the second step, not the first, in the settlement of a "major" dispute—that the primary duty of the parties is to bargain. *Elgin, J. & E. Ry.* v. *Burley*, 325 U. S. 711, 724-725 (1945). "It was that specific command for the disobedience of which this Court held in the *Virginian Ry. Co.* case (300 U. S. 515) that courts would provide a remedy." *General Committee* v. *Missouri-K.-T. R. R.*, 320 U. S. 323, 331 (1943).

This was neither a jurisdictional dispute, as in the M-K-T case, nor a representation dispute, as in the ALPA case.* The Courts below did no more, and no less, than apply settled law under the Railway Labor Act.

4. The Norris-La Guardia Act Is Inapplicable; Moreover, Petitioners' Arguments Based upon That Act Are Obviated by the Findings of Fact.

Both petitioners advance reasons for granting the writ based upon the Norris-La Guardia Act.

It is answer enough to the Company's argument that the Norris-La Guardia Act is inapplicable. *Virginian Ry.* v. *System Federation No. 40,* 300 U. S. 515 (1937). In the words of the District Court, that conclusion follows from "the facts as found," which are "exactly the same as in the *Virginian Ry.* case" (R. Vol. III, 52b, 53b): the carrier refused to recognize the bargaining representative certified by the NMB; instead, the carrier attempted to negotiate a collective bargaining agreement with another organization; the carrier was enjoined, in a "major" dispute, from negotiating such an agreement with any organization other

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* The Chapter, unlike ALPA, was certified by the NMB and, unlike ALPA, was and is not challenged by a rival representative (R. Vol. III, 52b-53b). The Company's "pending" petition to the NMB was filed May 16, 1963 (not "1964"; Pet. 7) for leave to intervene in the matter of the application of the Pilots' new union, Allied Pilots Association, for a certificate covering only pilots and co-pilots (R. Vol. III, 60b-70b). Allied has long been certified, but the Company's petition has not yet been granted. That petition, which favors the determination of a single craft or class including pilots, co-pilots and flight engineers, flouts the Feinsinger Commission recommendations (R. Vol. IV, 3d), which the Company publicly accepted (R. Vol. III, 10b; Vol. IV, 10d). Contrary to the statement in the Pilots' petition (Pet. 13), the Engineers did *not* intervene.

than the certified representative. For more than a quarter-century, *Virginian Ry.* has been consistently cited for the proposition that the duty to bargain and other duties under the Railway Labor Act are "binding and their breach redressable in the federal courts." *International Ass'n of Machinists* v. *Central Airlines, Inc.*, 372 U. S. 682, 690 (1963).

An equally dispositive answer is the District Court's alternative holding—that "in any event and on this record" the Engineers in fact satisfied the requirements of Sections 7 and 8 of the Norris-LaGuardia Act (29 U. S. C. §§107, 108) (R. Vol. III, 54b-55b).

Likewise, the short answer to the Pilots' argument is that its underlying assumption—that the Pilots were not found guilty of any wrongdoing—is refuted by the District Court's findings. The argument is based largely on the fact that the Pilots never purported to represent the flight engineers (Pet. 7). But that fact only underscores their wrongdoing, for the District Court found (1) that "despite the withdrawal of the engineers from the joint sessions," the Pilots "continued their negotiations" with the Company "for an overall agreement," reaching and reducing to writing a "basic working agreement" which "covered both pilots and engineers, as to compensation and everything else" and "was designed to be executed by one bargaining representative for all 'pilots', including engineers," and (2) that neither this agreement nor a Company letter to the Pilots' chairman confirming the "rates" of pay and retirement benefits for engineers" already negotiated and offering to negotiate "retroactive pay for engineers" with the "Joint Committee," was ever shown to the Engineers

(R. Vol. III, 40b-41b, 42b). Thus the Pilots, neither representing nor claiming to represent the flight engineers, knowingly enabled the Company to consummate its refusal to bargain, in violation of the "affirmative duty to treat only with the true representative, and . . . the negative duty to treat with no other." *Virginian Ry.* v. *System Federation No. 40, supra* at 300 U. S. 548.

It was the negotiation of that agreement, which came to light only during the trial, that led to the addition of the Pilots as parties defendant *and* to the issuance of a temporary restraining order against their signing that agreement or publicizing it at pilot council meetings to which flight engineers had been invited (R. Vol. IV, 1d). For there was uncontroverted testimony, by the Company and by the Pilots' chairman, that the Company delivered over 100 copies of that agreement to the Pilots, whom the Company knew would call and hold council meetings so as to acquaint not only the pilots with it, but also the flight engineers.*

It was thus appropriate to restrain and enjoin the Pilots, once they were made parties, as active participants in the wrongdoing, the "power play," whatever their motives. And it is apparent that the District Court's order realistically reflects the circumstances of this case and reasonably restrains only the specific conduct in which the Pilots engaged. "Nothing in this order is intended to limit any rights which any party may have under the Railway Labor Act" (Jt. App. 52).

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* This testimony appears at pages 349-350, 382-384 and 2830-2831 of the trial transcript, which is part of the record on appeal in the Second Circuit. 2d Cir. R. 11 (a).

Conclusion

For the foregoing reasons, the petitions should be denied.

Dated: New York, New York,
October 1, 1964.

Respectfully submitted,

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